

# UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 85813593

MARK: INSURGENT

**\*85813593\***

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GENERAL TRADEMARK INFORMATI  
<http://www.uspto.gov/trademarks/index.jsp>

**TTAB INFORMATION:**

<http://www.uspto.gov/trademarks/process/appeal/i>

**APPLICANT:** Summit Entertainment, LLC

**CORRESPONDENT'S REFERENCE/DOCKET NO :**

22HF-165423

**CORRESPONDENT E-MAIL ADDRESS:**

## **EXAMINING ATTORNEY'S APPEAL BRIEF**

Applicant has appealed the Trademark Examining Attorney's final refusal to register the mark INSURGENT on the ground of likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d) with Registration No. 4392625, INSURGENCY.

### **FACTS**

On January 1, 2013, applicant, Summit Entertainment, LLC, applied to register the mark INSURGENT for various goods including "computer games, namely, computer game cartridges, cassettes, tapes, discs, programs and software" "downloadable widget program for use in authoring, downloading, transmitting, receiving, editing, extracting, encoding, decoding, playing, storing and organizing electronic games" "electronic games downloadable via the internet and mobile devices" and "video games, namely, video game cartridges, discs and software." The final refusal to register was limited to these goods.

In an office action dated April 16, 2013, the examining attorney suspended the application pending the disposition of application no. 85032335. The pending cited application registered and on November 6, 2014, the examining refused registration under Section 2d of the Trademark Act on the ground that applicant's mark INSURGENT is confusingly similar to the mark INSURGENCY, registration no.

4392625 for “Computer game software for personal computers and home video game consoles.”

On May 7, 2014, applicant responded to the Office Action by presenting arguments against the refusal to register, and on June 5, 2014, a final refusal was issued on the ground of likelihood of confusion.

On December 8, 2014, applicant filed a timely notice of appeal and request for reconsideration. On December 16, 2014, the request for reconsideration was denied. On March 20, 2015, applicant requested a division of the application and an amendment to the identification of goods in the parent application so that the wording “all relating to motion pictures and entertainment concerning motion pictures” was added to the identification of goods at issue. The division was accepted and the refusal to register the parent application was maintained.

Applicant submitted an appeal brief on October 30, 2015 and the appeal was forwarded to the examining attorney on November 3, 2015. Likelihood of confusion is the only issue on appeal.

### **ISSUE**

There is a likelihood of confusion between applicant’s mark INSURGENT for “Computer games, namely, computer game cartridges, cassettes, tapes, discs, programs and software; downloadable widget program for use in authoring, downloading, transmitting, receiving, editing, extracting, encoding, decoding, playing, storing and organizing electronic games; electronic games downloadable via the Internet and mobile devices; video games, namely, video game cartridges, discs and software, all relating to motion pictures and entertainment concerning motion pictures” and the registered mark INSURGENCY for “Computer game software for personal computers and home video game consoles,” under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d).

### **ARGUMENT**

Applicant’s mark INSURGENT for “Computer games, namely, computer game cartridges, cassettes, tapes, discs, programs and software; downloadable widget program for use in authoring, downloading, transmitting, receiving, editing, extracting, encoding, decoding, playing, storing and organizing electronic games; electronic games downloadable via the Internet and mobile devices; video games, namely, video

game cartridges, discs and software, all relating to motion pictures and entertainment concerning motion pictures” is confusingly similar to the registered mark INSURGENCY for “Computer game software for personal computers and home video game consoles.”

### **LIKELIHOOD OF CONFUSION**

Applicant’s mark is confusingly similar to the cited mark and the identified goods are related.

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely a potential consumer would be confused, mistaken, or deceived as to the source of the goods and/or services of the applicant and registrant. *See* 15 U.S.C. §1052(d). A determination of likelihood of confusion under Section 2(d) is made on a case-by case basis and the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973) aid in this determination. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1349, 98 USPQ2d 1253, 1256 (Fed. Cir. 2011) (citing *On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1085, 56 USPQ2d 1471, 1474 (Fed. Cir. 2000)). Not all the *du Pont* factors, however, are necessarily relevant or of equal weight, and any one of the factors may control in a given case, depending upon the evidence of record. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d at 1355, 98 USPQ2d at 1260; *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); *see In re E. I. du Pont de Nemours & Co.*, 476 F.2d at 1361-62, 177 USPQ at 567.

In any likelihood of confusion determination, two key considerations are similarity of the marks and similarity or relatedness of the goods and/or services. *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 (TTAB 2015) (citing *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 USPQ 24, 29 (C.C.P.A. 1976)); *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010); *see* TMEP §1207.01. That is, the marks are compared in their entirety for similarities in appearance, sound, connotation, and commercial impression. *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973)); TMEP §1207.01(b)-(b)(v). Additionally, the goods and/or services are compared to determine whether they are similar or commercially related or travel in the same trade channels. *See Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369-71, 101 USPQ2d 1713,

1722-23 (Fed. Cir. 2012); *Herbko Int'l, Inc. v. Kappa Books, Inc.* , 308 F.3d 1156, 1165, 64 USPQ2d 1375, 1381 (Fed. Cir. 2002); TMEP §1207.01, (a)(vi).

#### **A. The Marks Are Confusingly Similar**

Applicant's mark INSURGENT is confusingly similar to the registered mark INSURGENCY because they have the same meaning, they look and sound alike, lesser similarity is needed when the goods are identical, and because they create the same overall commercial impression. In addition, applicant's argument that the cited mark is weak is not persuasive, even weak marks are entitled to protection, applicant's family of marks is not relevant, and the fame of applicant's mark supports the refusal.

Marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F. 3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)); TMEP §1207.01(b)-(b)(v). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re 1st USA Realty Prof'ls, Inc.* , 84 USPQ2d 1581, 1586 (TTAB 2007)); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988)); TMEP §1207.01(b).

When comparing marks, the test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods and/or services offered under the respective marks is likely to result. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 1053, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *In re Davia*, 110 USPQ2d 1810, 1813 (TTAB 2014); TMEP §1207.01(b). The proper focus is on the recollection of the average purchaser, who retains a general rather than specific impression of trademarks. *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049, (TTAB 2014); *L'Oreal S.A. v. Marcon* , 102 USPQ2d 1434, 1438 (TTAB 2012); TMEP §1207.01(b).

#### **1. The respective marks have the same meaning**

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The respective marks have the same meaning because “insurgency” is defined as being “insurgent.” See definitions attached to the final office action of June 5, 2015.

**2. The respective marks look and sound alike**

Applicant’s mark INSURGENT and the cited mark INSURGENCY look alike and sound very similar. Slight differences in the sound of similar marks will not avoid a likelihood of confusion. *In re Energy Telecomm. & Elec. Ass’n*, 222 USPQ 350, 351 (TTAB 1983); *see In re Viterro Inc.*, 671 F.3d 1358, 1367, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012).

INSURGENT and INSURGENCY both include the identical letters “insurgen” to begin the words. The majority of both marks and the dominant part of both marks are these identical letters. The only difference between the two marks is the “t” that ends applicant’s mark, while the cited mark ends in “cy.” However, this difference is not sufficient to overcome the confusing similarity between the marks, as the majority of the two marks are identical because they are derived from the same root term and, as indicated above, they have the same meaning.

In fact, the dictionary definition from DICTIONARY.COM states that “insurgence” and “insurgency” can be confused. If this is true, then clearly “insurgent” and “insurgency” can also be confused.

**3. Lesser similarity between the marks required when the respective goods are identical**

Because the respective identified goods are both the identical game software, the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as in the case of diverse goods and/or services. *See United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014) (quoting *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992)); TMEP §1207.01(b).

**4. Even if the respective marks look different, they have the same commercial impression**

As indicated above, the respective marks have the same meaning and therefore the same overall commercial. Applicant contends that the marks are not confusingly similar on the ground that the marks

look different. However, even if applicant's contention is correct, consumer confusion has been held likely for marks that do not physically sound or look alike but that convey the same idea, stimulate the same mental reaction, or may have the same overall meaning. *Proctor & Gamble Co. v. Conway*, 419 F.2d 1332, 1336, 164 USPQ 301, 304 (C.C.P.A. 1970) (holding MISTER STAIN likely to be confused with MR. CLEAN on competing cleaning products); *see In re M. Serman & Co.*, 223 USPQ 52, 53 (TTAB 1984) (holding CITY WOMAN for ladies' blouses likely to be confused with CITY GIRL for a variety of female clothing); *H. Sichel Sohne, GmbH v. John Gross & Co.*, 204 USPQ 257, 260-61 (TTAB 1979) (holding BLUE NUN for wines likely to be confused with BLUE CHAPEL for the same goods); *Ralston Purina Co. v. Old Ranchers Canning Co.*, 199 USPQ 125, 128 (TTAB 1978) (holding TUNA O' THE FARM for canned chicken likely to be confused with CHICKEN OF THE SEA for canned tuna); *Downtowner Corp. v. Uptowner Inns, Inc.*, 178 USPQ 105, 109 (TTAB 1973) (holding UPTOWNER for motor inn and restaurant services likely to be confused with DOWNTOWNER for the same services); TMEP §1207.01(b).

#### **5. Applicant's evidence that INSURGENT is a weak term is not persuasive**

Applicant has submitted three printed or electronic copies of third-party registrations for marks containing INSURGENCY, INSURGENTE and INSURGENTES to support the argument that INSURGENCY is weak, diluted, or so widely used that it should not be afforded a broad scope of protection. Three registrations with only one containing the cited mark INSURGENCY is not evidence that INSURGENCY is weak. On the contrary, only one third-party registration containing the cited mark is in fact evidence that INSURGENCY is not a weak term.

Furthermore, these registrations appear to be for goods and/or services that are predominantly different or unrelated to those identified in applicant's application.

The weakness or dilution of a particular mark is generally determined in the context of the number and nature of similar marks in use in the marketplace in connection with similar goods and/or services. *See Nat'l Cable Tel. Ass'n, Inc. v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 1579-80, 19 USPQ2d 1424, 1430 (Fed. Cir. 1991); *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973). Evidence of widespread third-party use of similar marks with similar goods

and/or services “is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection” in that industry or field. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1373-74, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005); *see In re Coors Brewing Co.*, 343 F.3d 1340, 1345, 68 USPQ2d 1059, 1062-63 (Fed. Cir. 2003).

However, evidence comprising only a small number of third-party registrations for similar marks is generally entitled to little weight in determining the strength of a mark. *See AMF Inc. v. Am. Leisure Products, Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (C.C.P.A. 1973); *Richardson-Vicks Inc. v. Franklin Mint Corp.*, 216 USPQ 989, 992 (TTAB 1982). These few registrations are “not evidence of what happens in the market place or that customers are familiar with them.” *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d at 1406, 177 USPQ at 269; *see Richardson-Vicks Inc. v. Franklin Mint Corp.*, 216 USPQ at 992. Thus, the few similar third-party registrations submitted by applicant are insufficient to establish that the wording INSURGENCY is weak or diluted.

#### **6. Weak terms are still entitled to protection**

Even if INSURGENT and/or INSURGENCY were determined to be weak terms, the Court of Appeals for the Federal Circuit and the Trademark Trial and Appeal Board have recognized that marks deemed “weak” or merely descriptive are still entitled to protection against the registration by a subsequent user of a similar mark for closely related goods and/or services. TMEP §1207.01(b)(ix); *see King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 1401, 182 USPQ 108, 109 (C.C.P.A. 1974) (likelihood of confusion is “to be avoided, as much between ‘weak’ marks as between ‘strong’ marks, or as between a ‘weak’ and ‘strong mark’)); *In re Colonial Stores, Inc.*, 216 USPQ 793, 795 (TTAB 1982) (“even weak marks are entitled to protection against registration of similar marks”). This protection extends to marks registered on the Supplemental Register. TMEP §1207.01(b)(ix); *see, e.g., In re Clorox Co.*, 578 F.2d 305, 307-08, 198 USPQ 337, 340 (C.C.P.A. 1978); *In re Hunke & Jochheim*, 185 USPQ 188, 189 (TTAB 1975).

#### **7. Applicant’s family of marks and use on other goods/services is not relevant**

Applicant argues that the applied-for mark is part of a family of marks and that the purchasing public’s

familiarity with these marks obviates any likelihood of confusion. However, the Trademark Trial and Appeal Board has found that a family-of-marks argument is “not available to an applicant seeking to overcome a likelihood-of-confusion refusal.” *In re Cynosure, Inc.*, 90 USPQ2d 1644, 1645-46 (TTAB 2009). Specifically, an applicant’s ownership of other similar marks has little relevance in this context because the focus of a likelihood-of-confusion analysis in an ex parte case is on the mark applicant seeks to register, rather than other marks applicant has used or registered. *In re Cynosure, Inc.*, 90 USPQ2d at 1645-46; *In re Ald, Inc.*, 148 USPQ 520, 521 (TTAB 1965); TMEP §1207.01(d)(xi).

## **8. Fame of the respective marks**

The examining attorney is not expected to submit evidence as to the fame of the cited registered mark. In addition, applicant’s evidence that applicant’s mark is famous supports the refusal to register.

### **a. No requirement to submit evidence that cited mark is famous**

Applicant contends that one reason the refusal should be withdrawn is that the examining attorney did not provide any evidence that the cited mark is famous.

However, because of the nature of the evidence required to establish the fame of a registered mark, the TTAB normally does not expect the examining attorney to submit evidence as to the fame of the cited mark in an ex parte proceeding. *See In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006). And, in an ex parte analysis of the *du Pont* factors for determining likelihood of confusion, the “fame of the mark” factor is normally treated as neutral when no evidence as to fame has been provided. *See id.*; *see also In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009) (noting that the absence of evidence as to the fame of the registered mark “is not particularly significant in the context of an ex parte proceeding”). *See* TMEP section 1207.01(d)(ix).

### **b. Applicant’s evidence of fame for applicant’s mark supports the refusal to register**

Applicant appears to contend that there is no likelihood of confusion on the ground that applicant’s mark is famous and consumers would not confuse applicant’s famous mark INSURGENT with registrant’s INSURGENCY. However, if applicant’s mark is famous, then reverse confusion is likely. The Trademark Act not only guards against the misimpression that the senior user is the source of the junior



user's goods and/or services, but it also protects against "reverse confusion," that is, the junior user is the source of the senior user's goods and/or services. *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993); *Fisons Horticulture, Inc. v. Vigoro Indust., Inc.*, 30 F.3d 466, 474-75, 31 USPQ2d 1592, 1597-98 (3d Cir. 1994); *Banff, Ltd. v. Federated Dep't Stores, Inc.*, 841 F.2d 486, 490-91, 6 USPQ2d 1187, 1190-91 (2d Cir. 1988).

Applicant points out in its response of 05/07/2014, that "a well-known or famous mark is entitled to a broader scope of protection than one which is relatively unknown." Famous marks are afforded a broad scope of legal protection because they are more likely to be remembered and associated in the public mind than a weaker mark. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1374, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005). See TMEP Section 1207.01(d)(ix). In applicant's response and request for reconsideration, applicant submits statements and evidence to support the apparent claim that applicant's mark is a famous mark. This evidence in fact supports the refusal to register, as it is likely that there will be "reverse confusion" between the cited mark and applicant's mark because applicant's mark is famous.

Also see *Starbucks U.S. Brands, LLC v. Ruben*, 78 USPQ2d 1741, 1750 (TTAB 2006) ("As the fame of a mark increases, the degree of similarity between the marks necessary to support a conclusion of likely confusion declines."); see also *Nike, Inc. v. Maher*, 100 USPQ2d 1018, 1023 (TTAB 2011) (finding applicant's mark JUST JESU IT, and opposer's mark JUST DO IT similar for likelihood of confusion purposes "despite the potential differences in meaning, given the fame of opposer's mark and the similarity of appearance, pronunciation and overall commercial impressions").

#### **B. The Respective Goods Are Related**

The respective goods are related because they are all computer games. The respective goods are effectively identical, applicant's extrinsic evidence of use is not relevant, the amendment to the identification of goods does not overcome the refusal, the trade channels are identical and sophisticated purchasers are not immune to confusion.

Applicant's identification of goods is the following:

“Computer games, namely, computer game cartridges, cassettes, tapes, discs, programs and software; downloadable widget program for use in authoring, downloading, transmitting, receiving, editing, extracting, encoding, decoding, playing, storing and organizing electronic games; electronic games downloadable via the Internet and mobile devices; video games, namely, video game cartridges, discs and software, all relating to motion pictures and entertainment concerning motion pictures.”

Registrant’s identification of goods is the following:

“Computer game software for personal computers and home video game consoles.”

**1. The respective goods are effectively identical**

Registrant’s and applicant’s identification of goods are worded broadly enough to include the identical computer games.

Registrant’s identification of goods, “Computer game software for personal computers and home video game consoles” is worded broadly enough to include applicant’s more specific “Computer games, namely, computer game cartridges, cassettes, tapes, discs, programs and software; downloadable widget program for use in authoring, downloading, transmitting, receiving, editing, extracting, encoding, decoding, playing, storing and organizing electronic games; electronic games downloadable via the Internet and mobile devices; video games, namely, video game cartridges, discs and software, all relating to motion pictures and entertainment concerning motion pictures.” The respective goods are all computer game software.

In addition, registrant’s identification of goods is worded broadly enough to include computer game software relating to motion pictures and entertainment concerning motion pictures.

Unrestricted and broad identifications are presumed to encompass all goods and/or services of the type

described. *See In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (citing *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992).

**2. Applicant's extrinsic evidence of actual use is not persuasive**

Applicant submits evidence that applicant's goods are a computer game associated with a specific motion picture, while registrant's goods are a computer game associated with military operations in Iraq and Afghanistan. However, registrant's identification of goods does not limit registrant's computer games in this way and applicant cannot effectively partially cancel the cited registration by limiting the goods in a way that is not reflected in the registration.

With respect to applicant's and registrant's goods and/or services, the question of likelihood of confusion is determined based on the description of the goods and/or services stated in the application and registration at issue, **not on extrinsic evidence of actual use**. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1323, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys. Inc. v. Hous. Computers Servs. Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)).

**3. The amendment to applicant's identification of goods is not sufficient to show that the respective goods are not related**

Applicant amended the identification of goods to limit applicant's goods to "all relating to motion pictures and entertainment concerning motion pictures."

**a. Registrant's identification contains broad language**

The amendment to the applicant's identification of goods is not sufficient to show that the respective goods are not related because registrant's identification of goods is worded broadly enough to include computer games related to motion pictures and entertainment concerning motion pictures.

If the cited registration has a broad identification of goods or services, an applicant does not avoid likelihood of confusion merely by more narrowly identifying its related goods. *See, e.g., In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992) (noting that, where registrant's goods are broadly identified as

“computer programs recorded on magnetic disks,” without any limitation as to the kind of programs or the field of use, it must be assumed that registrant’s goods encompass all such computer programs, including computer programs of the type offered by applicant, that they travel in the same channels of trade normal for such goods, and that they are available to all classes of prospective purchasers of those goods); *In re Diet Ctr., Inc.*, 4 USPQ2d 1975 (TTAB 1987) (noting that, although applicant had limited its identification to indicate that its goods were sold only through franchised outlets offering weight-reduction services, the cited registration’s identification contained no limitations as to trade channels or classes of customers and thus it must be presumed that registrant’s goods travel through all the ordinary channels of trade); *In re Uncle Sam Chem. Co.*, 229 USPQ 233 (TTAB 1986) (finding that although applicant’s cleaning preparations and degreasers were limited to those for industrial and institutional use, registrant’s liquid preparations for cleaning woodwork and furniture, as identified, were not restricted to any particular trade channels or classes of customers and thus could presumably be used for institutional and industrial purposes).

**b. The amendment to the identification of goods does not differentiate the respective goods**

Even if, as suggest by applicant, registrant’s computer games should be limited to computer games relating to military operations in Afghanistan, applicant’s amended identification of goods only limits applicant’s computer games as relating to motion pictures. This is worded broadly enough to include motion pictures about military operations in Iraq and Afghanistan. Therefore, the respective identifications of goods are worded broadly enough to be the identical computer games.

**4. The trade channels for the respective goods are identical**

Applicant contends that the respective goods are marketed in different trade channels. However, as previously indicated, the question of likelihood of confusion is determined based on the description of the goods and/or services stated in the application and registration at issue, not on extrinsic evidence of actual use. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1323, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys. Inc. v. Hous. Computers Servs. Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)).

Absent restrictions in an application and/or registration, the identified goods and/or services are “presumed to travel in the same channels of trade to the same class of purchasers.” *In re Viterro Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)).

In this case, the identification set forth in the application and registration(s) has no restrictions as to nature, type, channels of trade, or classes of purchasers. Therefore, it is presumed that these goods and/or services travel in all normal channels of trade, and are available to the same class of purchasers.

Furthermore, even if applicant’s extrinsic evidence were to be accepted, applicant provides no evidence as to why different types of game software are sold in different trade channels. On the contrary, a wide variety of computer games are commonly sold in the same section of a store or on the same website. Consumers searching for applicant’s computer game relating to a motion picture are very likely to encounter a military computer game because such computer games are commonly sold via identical outlets.

#### **5. Sophisticated purchasers are not immune to confusion**

Applicant contends that the purchasers of game software are sophisticated consumers. However, even if this is true, the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. TMEP §1207.01(d)(vii); *see, e.g., Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1325, 110 USPQ2d 1157, 1163-64 (Fed. Cir. 2014); *Top Tobacco LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011).

#### **ANY DOUBT RESOLVED IN FAVOR OF REGISTRANT**

The overriding concern is not only to prevent buyer confusion as to the source of the goods and/or services, but to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993).

Therefore, any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant. TMEP §1207.01(d)(i); *see Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

### **CONCLUSION**

Applicant's mark INSURGENT is confusingly similar to the registered mark INSURGENCY and the identified goods are identical. For the foregoing reasons, the refusal to register on the basis of Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), for the reason that there is a likelihood of confusion, should be affirmed.

Respectfully submitted,

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